UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE E. DUDLEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-222-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from an affective disorder and rhomboid muscle strain, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had an affective disorder and a left

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 21, 2002, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

rhomboid muscle strain, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 21; that he had no significant nonexertional limitations narrowing the range of work that he was capable of performing, Finding 7, *id*; that, given his exertional capacity (sedentary work), age (38), education (at least high school) and work experience (skilled), application of Rules 201.28 and 201.29 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion that he was not disabled, Findings 8-11, *id*.; and that he therefore had not been under a disability at any time through the date of decision, Finding 12, *id*. at 22.[2] The Appeals Council declined to review the decision, *id*. at 6-8, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

[2] Inasmuch as the plaintiff was insured for purposes of SSD through at least December 31, 2002, Record at 14, there was no need to
(continued on next page)

The plaintiff does not dispute that the administrative law judge's finding as to exertional capacity is substantially supported by the evidence relating to his rhomboid muscle strain; however, he contends that he suffered from significant nonexertional limitations, as a result of which the administrative law judge was precluded from relying solely on the Grid. Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 3) at 5. I find no reversible error.

I. Analysis

The plaintiff complains, in the main, that (i) the administrative law judge failed to properly analyze the psychiatric evidence of record, and (ii) erroneously determined that his mental impairments imposed no significant nonexertional limitation, undermining reliance on the Grid. *Id.* at 5-8.

As the plaintiff points out, a finding that a mental impairment is severe necessarily means that it constitutes a significant nonexertional limitation. *See id*. at 7-8, *see also, e.g.*, 20 C.F.R. §§ 404.1520(c), 416.920(c) ("If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled."). However, the existence of a significant nonexertional impairment does not necessarily undermine reliance on the Grid. Even in such cases, the commissioner may yet rely exclusively upon the Grid if "a non-strength impairment . . . has the effect only of reducing that occupational base marginally." *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). In the realm of mental impairments, the First Circuit has held that even "moderate" restrictions in mental residual functional capacity ("RFC") do not significantly compromise a claimant's capacity for the full range of unskilled work. *Id.* at 527-28.[3]

undertake a separate analysis of his level of disability as of his date last insured.

[3] The administrative law judge applied two alternative Grid rules, one presupposing ability to perform skilled or semi-skilled work with skills not transferable, and one presupposing ability to perform skilled or semi-skilled work with skills transferable. *See* Finding 11, *(continued on next page)*

The plaintiff points out, *inter alia*, that although the administrative law judge completed a Psychiatric Review Technique Form ("PRTF") finding "insufficient evidence" of degree of functional limitation in all four areas addressed, he nonetheless (inconsistently) determined that the plaintiff's mental impairments did not impose a significant limitation on work activity. Statement of Errors at 7; *see also* Record at 23-25. In so arguing, the plaintiff misapprehends the nature of the PRTF.

The PRTF is employed at Steps 2 and 3 of the sequential-evaluation process to assess whether a mental condition is severe and, if so, whether it meets or equals the Listings. *See, e.g.*, Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2001), at 147 ("The psychiatric review technique . . . summarized on the [PRTF] requires adjudicators to assess an individual's limitations and restrictions from a mental impairment(s) in categories identified in the 'paragraph B' and 'paragraph C' criteria of the adult mental disorders listings. The adjudicator must remember that the limitations identified in the 'paragraph B' and 'paragraph C' criteria [of a PRTF] are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment[.]"); *see also* 20 C.F.R. §§ 404.1520a(c); 416.920a(c).

Here, there is no question that the plaintiff's mental impairments are severe, and the plaintiff presses no argument that he had a disability that should have been found to have met or equaled a Listing. Rather, the question presented is whether the administrative law judge supportably could

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Record at 21; *see also* Rules 201.28 & 201.29, Table 1, Appendix 2 to Grid. *Ortiz's* holding, which concerns unskilled work, nonetheless is instructive because, in the case of both those who lack transferable skills and those whose work has been unskilled, the focus is on basic aptitudes for work. *See, e.g., Ellington v. Secretary of Health & Human Servs.*, 738 F.2d 159, 161 (6th Cir. 1984) (noting that distinction between skills, aptitudes is "implicit" in Grid, and "[s]kills relates to specific 'vocationally significant work activities,' while aptitudes involve only 'basic work activities' . . . necessary to do most jobs.") (citations and internal quotation marks omitted).

have concluded that his mental impairments were not so limiting as to "narrow the range of work he can perform." Record at 19.[4]

The record contains only one official mental RFC assessment, that of non-examining consultant Joseph L. Sheridan, M.D., dated January 5, 1999.[5] Record at 176-78. Dr. Sheridan found no limitation in two of the four broad categories addressed: (i) Understanding and Memory and (ii) Adaptation. *Id*. With respect to a third category, Sustained Concentration and Persistence, Dr. Sheridan assessed the plaintiff as "not significantly limited" in five of eight subcategories and "moderately limited" in the remaining three, explaining, "[b]est with non-complex tasks." *Id*. With respect to the final category, Social Interaction, Dr. Sheridan judged the plaintiff "not significantly limited" in two of five categories and "moderately limited" in the remaining three, noting: "[s]ocial abilities adequate but has temper problem and some paranoid tendencies when under stress." *Id*. at 177-78.

Although the administrative law judge fails even to mention the Sheridan mental RFC assessment, it is consistent with evidence of record upon which he did rely, including:

1. Indications that the plaintiff's affective disorders had responded well to treatment. *Id.* at 19; *see also, e.g., id*. at 279 (September 1998 progress note of treating psychiatrist M. Jenner, D.O., that plaintiff "doing well on sertraline 100mg qd and depakote 500 mg bid – will continue.").

[4] The full sentence from which this phrase is extracted reads: "With treatment, the claimant's depression has not caused ongoing significant non-exertional limitations which narrow the range of work he can perform." Record at 19. As discussed above, the administrative law judge either erred or misspoke in finding that the plaintiff's mental impairments imposed no "significant" nonexertional limitation. However, semantics aside, the administrative law judge focused on the critical issue: whether, for purposes of use of the Grid, work-capacity restrictions caused by the plaintiff's mental impairments eroded the occupational base only marginally.

[5] A second non-examining consultant, David R. Houston, Ph.D., completed a PRTF dated September 8, 1998; however, Dr. Houston did not complete a mental RFC assessment inasmuch as he found the plaintiff's mental impairments non-severe. *See* Record at 142; 20 C.F.R. §§ 404.1520a(d)(3); 416.920a(d)(3) ("If we find that you have a severe mental impairment(s) that neither meets nor is equivalent in severity to any listing, we will then assess your residual functional capacity.").

2. The August 1998 report of a treating physician, Glenn Robinson, M.D., that although the plaintiff's ability to relate to co-workers "need[ed] consideration," he nevertheless could respond appropriately to work pressure, supervision and co-workers, that it was in his best interest to be productive and that "his depression modifies quite well with a change of environment and particularly with an anti-depressant." *Id*. at 19; *id*. at 300, 302.

3. Dr. Jenner's September 1998 report that the plaintiff was "willing and able to work." *Id*. at 19; *id*. at 279.

4. The April 1999 report of a treating psychiatrist, S.D. Krulikoski, D.O., that the plaintiff "appears psychiatrically stable to work." *Id*. at 19; *id*. at 313.

The Record accordingly substantially supports the finding (aligning with *Ortiz*) that the plaintiff's mental impairments were not of such a magnitude as to foreclose exclusive reliance on the Grid.[6]

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for

[6] To the extent the plaintiff argues that the administrative law judge relied at hearing on a medical expert unqualified to assess psychiatric issues, internist Peter B. Webber, M.D., Statement of Errors at 6 & n.10, any such objection was waived when the plaintiff's then-counsel stipulated at hearing to Dr. Webber's qualifications, Record at 58. To the extent the plaintiff complains that the administrative law judge "ignored" evidence that he suffered from post-traumatic stress disorder and that his mental condition had deteriorated considerably as of June 2000, *see* Statement of Errors at 4-5 & n.6; Record at 341-42, I note that this evidence was not before the administrative law judge, whose decision issued on September 22, 1999. Although this evidence was presented to the Appeals Council, *see* Record at 6, 8, the plaintiff does not argue that the Appeals Council erred in concluding that the new evidence did not provide a basis for changing the administrative law judge's decision, *see id.* at 6; *see also, e.g.*, *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001) ("The ALJ has not 'made a mistake' in ignoring new evidence that was never presented to him. However, the Appeals Council may have 'made a mistake' in refusing to consider new evidence presented to it, depending on the ground it gave.").

which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of March, 2002.

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David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-222

DUDLEY v. SOCIAL SECURITY, COM Filed: 09/07/01
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Cause: 42:405 Review of HHS Decision (DIWC)

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